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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

AJA TERMINE, et al.,

Plaintiffs,

v.

WILLIAM S. HART UNION HIGH SCHOOL DISTRICT and WESTMARK SCHOOL,

Defendants.

CV 02-1114 SVW (MANx)

ORDER GRANTING PLAINTIFFS' MOTION FOR REIMBURSEMENT OF REASONABLE ATTORNEYS' FEES, STAYING PLAINTIFFS' MOTION FOR REIMBURSEMENT OF EXPERT FEES, AND REQUESTING FURTHER ACCOUNTING BY DISTRICT [177]

I. INTRODUCTION & BRIEF SUMMARY OF LITIGATION

Plaintiff Aja Termine ("Aja"), through her mother and co-Plaintiff Karen Termine (collectively "Plaintiffs"), sought a determination by the Court, pursuant to 20 U.S.C. § 1415(j), as to what was the appropriate "stay-put" placement for Aja during the pendency of Plaintiffs' due process hearing with Defendant William S. Hart Union High School District (the "District") before the California Special Education Hearing Office ("SEHO").[1]

[1] "Stay put" is the name commonly associated with the placement of a child during the pendency of any proceedings conducted pursuant to 20 U.S.C. § 1415, as set forth in 20 U.S.C. § 1415(j).

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In an Order issued on August 20, 2002, the Court determined that the proper stay-put placement for Aja was the interim placement provided by the District pursuant to California Education Code § 56325(a). In a Memorandum Disposition issued on March 12, 2004, the Ninth Circuit remanded the case to this Court. Subsequently, on August 17, 2004, this Court issued an Order re Stay Put, instructing the parties to brief the issue of whether the District's interim placement was in conformity with Aja's last agreed-upon Individual Education Program ("IEP"). Additionally, the Court joined the stay-put case, Case No. CV 02-1114-SVW, with the parties' cross-appeals of the SEHO decision, Case Nos. CV 02-7654-SVW and CV 02-7619-SVW.

In an Order issued on June 1, 2005 ("June 2005 Order"), the Court found that (1) the District's interim placement was not in conformity with Aja's last agreed-upon IEP; (2) the District's interim placement was an improper stay-put placement for Aja during the pendency of the due process hearing; and (3) the District must reimburse the Plaintiffs for tuition paid between Aja's enrollment in the District and the SEHO's decision, but only as to half of the tuition because of Mrs. Termines' unreasonable conduct.

This motion seeks attorneys' fees reimbursement pursuant to the Individuals with Disabilities Education Act ("IDEA") under 20 U.S.C. § 1415(i)(3)(B).

II. ANALYSIS

A. Were the Termines the Prevailing Party?

This case is a combination of two separate actions: the injunctive relief sought by Plaintiffs on the stay-put issue and cross-appeals from the SEHO decision. Defendants do not dispute that

Plaintiffs prevailed in the cross-appeals from the SEHO decision. Defendants do, however, dispute whether Plaintiffs should be the prevailing party for purposes of the stay-put action. Having considered the arguments, the Court finds that Plaintiffs should be declared the prevailing party for the stay-put action: they received relief and also changed the legal relationship of the parties. See Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 603-05 (2001).

The injunctive relief sought by Plaintiffs on the stay-put question has a convoluted history. "Stay put" is the name commonly associated with the placement of a child during the pendency of any proceedings conducted pursuant to 20 U.S.C. § 1415, as set forth in 20 U.S.C. § 1415(j). This history is readily ascertained by reference to the Court's June 2005 Order. The central issue in the dispute regarding whether Plaintiffs should be considered the prevailing party is that one of Plaintiffs' central legal arguments was rejected.

In the June 2005 Order, the Court found that the District's interim placement, which was also the District's stay put placement for Aja, was inappropriate, both as an interim placement and as a stay put placement. Nonetheless, the District argues that Plaintiffs are not the prevailing party with respect to the stay put action because Plaintiffs' argument was not just that the interim placement was inappropriate as the stay-put placement, but that the appropriate stay-put placement – defined as the student's "then-current educational placement at the time the dispute arose," 20 U.S.C. § 1415(j) – had to be the placement prior to the interim placement

because the interim placement could not properly be considered the "then-current educational placement." The Court rejected that interpretation of the IDEA, holding instead that the stay-put placement, while measured against the most recent IEP, which likely came from the child's prior placement, was defined in reference to the new district's resources and could include a placement consistent with the IEP other than the immediately prior placement. The Court determined that the interim placement was an inappropriate stay-put placement and that placement at Westmark was appropriate. The Westmark placement was appropriate, however, not because it was the site of Aja's prior placement, but because it was consistent with Aja's IEP – as other nonpublic schools might also be.

What all of this boils down to is that the focus of Plaintiffs' specific legal reasoning – that Aja had to stay at Westmark because, by the terms of the statute, Westmark was her "then-current educational placement – was rejected. Notwithstanding the Court's rejection of one of Plaintiffs' central arguments for *why* the stay-put placement was inappropriate, Plaintiffs achieved the relief they sought and also successfully invalidated the District's argument regarding the stay-put placement: Aja stayed at Westmark during the pendency of the dispute, Westmark was determined to be an appropriate stay put placement, the proposed placement by the District was held to be an inappropriate stay-put placement, and Plaintiffs were awarded reimbursement of tuition for the time period of the dispute. It can hardly be disputed that the District lost on the issue of the stay put placement – it was found that the District had not provided Aja with an appropriate stay-put placement.

In a case held by the Ninth Circuit to be applicable to IDEA attorneys' fees, Shapiro ex rel. Shapiro v. Paradise Valley Unified Sch. Dist. No. 69, 374 F.3d 857, 864-65 (9th Cir. 2004), the Supreme Court stated that a prevailing party is one who has achieved some relief from the court that changed the legal relationship between the parties. Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 603-05 (2001). In this case, Plaintiffs received relief because they were reimbursed for the tuition at Westmark. While the Court's decision did not mandate that Aja needed to be at Westmark during the pendency of the litigation (the stay-put time period), the Court did mandate that only a nonpublic school would be appropriate. The District argued that Aja should be in the interim placement, a public school. Thus, Plaintiffs received relief from the Court.

The Court's June 2005 Order also changed the legal relationship between the parties. Plaintiffs succeeded in defining stay-put placement differently than the District advocated (though not exactly as Plaintiffs advocated) and the Court declared the District's stay-put placement would have been inappropriate for Aja. While Plaintiffs' specific legal arguments did not prevail, Plaintiffs did succeed in having the District's proposed stay-put placement declared inappropriate and in having the District reimburse Plaintiffs for the tuition.[2] Plaintiffs received relief and changed the legal

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[2] Additionally, the District contends that, because of the timing of the Court's determination that the interim placement was an inappropriate stay-put placement – contemporaneous with the finding that the interim placement was inappropriate, period – Plaintiffs did not gain anything through the stay-put action and ended up in exactly the same place as they would have been had they not pursued the stay-put action. This argument does not take into account the tuition

relationship between the parties. Plaintiffs were the prevailing party on the stay-put action.

B. Are the Fees Reasonable?

Attorneys Steve Wyner ("Wyner") and Marcy Tiffany ("Tiffany") seek fees of $400 per hour for due process proceedings and $500 per hour for federal court proceedings. Plaintiffs also seek rates of $125 per hour for paralegal time. These rates are higher than the rates agreed to at certain times during the litigation. For example, Wyner and Tiffany were initially billed at $325 per hour, then raised their rate $350, and then raised their rate to the current rate; legal assistants were initially billed at $115 per hour and then the rate was raised to the current rate. Despite Defendants' arguments to the contrary, these rates appear to be within the current market range for attorneys with the extensive experience that both Wyner and Tiffany have.[3] Plaintiffs submitted numerous declarations of lawyers

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reimbursement gained through the stay-put action. Given the changes in the Court's approach and the shifting Ninth Circuit law during this case, it is clear that the law in this area was unsettled before this case. The Court's initial determination – that the interim placement was necessarily the stay-put placement, regardless of the appropriateness of the interim placement – would have denied Plaintiffs reimbursement for the Westmark tuition, even with the finding that the interim placement was not an adequate permanent placement. Thus, it seems possible that had Plaintiffs not brought the stay-put action and forced a determination of the legal standards in that area, Plaintiffs would not have been reimbursed.

[3] The District argues that it is inappropriate for Wyner and Tiffany to have a higher fee for federal court litigation and that this higher fee is essentially a "multiplier," which is not allowed for fees under the IDEA. Based on the supporting declarations submitted by Plaintiffs, it appears that, while $500 is on the higher end for civil rights litigation, it is still within the ballpark. It makes sense that Wyner and Tiffany would charge less for administrative proceedings, which are at least procedurally less complicated, than for federal court litigation.

The District argues that Wyner and Tiffany do not have the

in the relevant community who currently command rates close to or higher than the rate currently charged by Wyner and Tiffany. (See Crook Decl. ¶ 9 ($430 per hour); Sobel Decl. ¶ 3 ($550 per hour); Klausner Decl. ¶ 5 ($525 per hour); Litt Decl. ¶ 11 ($575 per hour); Vanaman Decl. ¶ 18 ($430 per hour).) The Court considers Wyner's and Tiffany's current rates to be reasonable. Additionally, Plaintiffs submitted three declarations in which the declarants' rates prior to 2005 are referenced. These declarations are sufficient to show that Wyner's and Tiffany's agreed upon rates during the bulk of the litigation (either $325 or $350) were reasonable. (See Klausner Decl. ¶ 5 ($400 per hour prior to January 1, 2003); Litt Decl. ¶ 11 ($500 per hour in 2001; $525 per hour in 2002); Vanaman Decl. ¶ 18 ($380 per hour prior to July 1, 2005).

Plaintiffs argue that all the hours worked should be reimbursed at the current rate to compensate Plaintiffs for the delay in payment. In the alternative, Plaintiffs argue that if the fees awarded by the Court are based on the hourly rate in effect when the work was done, the Court should award Plaintiffs interest (calculated

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experience or expertise to support these fees. That is not supported by the documentation.

The District argues that Wyner and Tiffany have not provided proof that any clients actually pay these fees. Wyner and Tiffany have provided evidence that these fees are paid by school districts in settlements and by clients for proceedings which are not covered by the fee shifting part of IDEA.

The District argues that the proper rate should be determined based on the fee charged by its attorney. Plaintiffs successfully rebut this argument by pointing out that the District's lawyer consistently represents the District and by pointing to Ninth Circuit precedent that disapproves using a defendant's lawyer's rate when the lawyer is a repeat player representing a government entity. See Trevino v. Gates, 99 F.3d 911, 925 (9th Cir. 1996).

at prime rate) on the fees to compensate for the delay in payment.[4] While the Court does not find that either party unreasonably delayed the litigation, the Court agrees that Plaintiffs' attorneys should be compensated for the delay in payment that is inherent in the reimbursement arrangements in civil rights actions. See Chem. Bank v. City of Seattle (In re Wash. Pub. Power Supply Sys. Sec. Litig.), 19 F.3d 1291, 1305 (9th Cir. 1994). Because Wyner's and Tiffany's current fees for federal court litigation are approximately 65% higher than their fees during the time of this litigation – which the Court views as a significant increase – the Court finds that the more appropriate method of compensating Plaintiffs' attorneys for the delay in payment is by awarding the agreed upon fees plus interest at the prime rate.

C. Should Expert Fees Be Included?

The Ninth Circuit has not spoken to whether expert witness fees are recoverable under the IDEA; other Circuits are split on the issue. The D.C., Seventh and Eighth Circuits have held that expert fees are not recoverable, while the Second and Third Circuits disagree. Compare Goldring v. District of Columbia, 416 F.3d 70 (D.C. Cir. 2005) (not allowing expert fee recovery); T.D. v. LaGrange Sch. Dist. No. 102, 349 F.3d 469 (7th Cir. 2003) (same); Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022 (8th Cir. 2003) (same), with Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 402 F.3d 332 (2d Cir. 2005), *cert. granted*, 74 U.S.L.W. 3026 (U.S. Jan 6, 2006) (No.

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[4] Plaintiffs correctly point out that if their rates are to be adjusted with interest (rather than by using their current billing rates), the prime rate should be used, not the Treasury Bill rate. See Chemical Bank v. City of Seattle (In re Washington Pub. Power Supply Sys. Sec. Litig.), 19 F.3d 1291, 1305 (9th Cir. 1994).

05-18) (allowing expert fee recovery); Arons v. N.J. Bd. of Educ., 842 F.2d 58 (3d Cir. 1988). Because the Supreme Court recently granted certiorari on this issue, see Murphy, 74 U.S.L.W. 3026, the Court deems it imprudent to rule on this issue until the issuance of the Supreme Court's decision. The Court therefore STAYS this issue pending the Supreme Court's decision in Murphy.

D. Should the Fees for this Request Be Included?

The District does not contest that the fees for this request should be included. Fees incurred to petition the Court for fee recovery are recoverable under § 1988. See Anderson v. Dir., Office of Workers Comp. Programs, 91 F.3d 1322, 1325 (9th Cir. 1996). The Court views the rationale behind this interpretation of § 1988 – that to find otherwise would dilute the fees recovered, therefore defeating the statutory purpose – equally applicable here. Id. Thus, fees for this fee request will be included in the recovery.

E. Is a Fee Reduction Appropriate?

Attorneys' fees are properly calculated by first determining the "lodestar" – the number of hours worked multiplied by the hourly rate – and then making reductions from the lodestar as appropriate.[5] Morales v. City of San Rafael, 96 F.3d 359, 362-63 (9th Cir. 1996), amended by, reh'g en banc denied, 108 F.3d 981 (9th Cir. 1997). The lodestar can then be reduced by certain factors. Id.

[5] When a Plaintiff has only achieved nominal or de minimis success, the method is different. Morales v. City of San Rafael, 96 F.3d 359, 362-63 (9th Cir. 1996), amended by, reh'g en banc denied, 108 F.3d 981 (9th Cir. 1997). In this case, Plaintiffs received reimbursement of half the tuition and a clarification of the law; the success was not nominal or de minimis.

The District argues that Plaintiffs' fees should be reduced based on (1) the nature of the action; (2) partial success; (3) unreasonable protraction of the litigation; and (4) time spent on discrete tasks after the issuance of the SEHO decision.

The District argues that the fees are excessive given the straightforward nature of the proceeding: the facts were not complex and, according to the District, neither was the legal analysis. The District concedes that the interpretation of the stay-put placement requirement was a novel legal question, as it must, considering that this Court changed its position after the Ninth Circuit remanded in light of a new decision. Obviously, the law was unclear and shifted during the course of the case. Plaintiffs' lawyers' number of hours is higher than the District's, but only by about 20%, which the Court deems reasonable considering that Plaintiffs' attorneys had to file opening and response briefs in the major actions in this Court and in the Ninth Circuit, whereas the District's lawyers only filed opposition briefs.

The District argues that Plaintiffs' fees should be reduced because Plaintiffs' tuition reimbursement was reduced by 50% as punishment for Ms. Termine's conduct as well as Plaintiffs' counsel's intransigence with respect to the initial IEP meeting. This Court approved that reimbursement reduction. The District argues for a reduction on this basis because (1) the reduction was a loss for Plaintiffs; and (2) because Ms. Termine and her counsel unreasonably protracted the litigation.

The District contends that the reduction in the reimbursement award was a loss for Plaintiffs and that accordingly the fees should

be reduced. In response, Plaintiffs argue that not obtaining full damages does not mean that they are not entitled to their full attorneys' fees, that Plaintiffs achieved their primary goal (keeping Aja at Westmark), and that the assessment issue was too intertwined with other issues and the amount of time too trivial to be separated out. Plaintiffs are correct that not recovering the full amount of damages requested does not necessarily constitute grounds for reducing fees. Morales, 96 F.3d at 362-63. Additionally, achievement of the public policy goal – for example, the interpretation of the statutory requirement for stay-put placement – can support not reducing the fee recovery because of a lower damages recovery. Id. at 363. In the instant case, Plaintiffs achieved an important part of their legal goal, a finding that the District's stay-put placement was inappropriate. Because Plaintiffs prevailed in their argument that the District's stay-put placement was wrong and clarified the law regarding stay-put placements, the Court does not consider it equitable to reduce the fee recovery based on partial success.

The District also argues that the fees should be reduced for the same reason that the reimbursement was reduced: because Ms. Termine and her counsel unreasonably protracted the front end of this dispute by making unreasonable requests with respect to the initial IEP conference with the District. Plaintiffs argue that the IEP meeting was unconnected with this litigation, but that is not entirely accurate. Plaintiffs' attorneys' billing records (those submitted to the Court) appear to include the time period during which the SEHO and this Court found that Plaintiffs and Plaintiffs' counsel

inappropriately protracted proceedings (October 21, 2001 through mid-February 2002). If practical to separate out the relevant time, the Court deems it appropriate to reduce the fee recovery for those hours spent delaying the initial IEP meeting with the District. The District should submit a detailed statement of the hours it believes were spent delaying the initial IEP meeting with the District. Plaintiffs will have an opportunity to respond.

The District also contends that time spent on discrete tasks after the SEHO decision that were unrelated to the proceedings in this case should not be included. The Court agrees. As more fully detailed in Part III, the District is therefore ordered to submit a detailed statement of the hours it believes were not spent on this matter. Plaintiffs will have an opportunity to respond.

F. Evidentiary Objections

The District objected to almost every statement made in the declarations submitted by Plaintiffs. Most of these objections are frivolous. For example, the legal background and billing rate of civil rights attorneys in Los Angeles is neither irrelevant nor confusing; in fact, it is helpful. The declarants profess personal knowledge of the statements made, which establishes foundation. The opinion testimony objected to did not involve impermissible legal conclusions or opinions but personal observations made by the declarants (for example, that attorneys who accept cases on a contingency basis charge more because of the risk; that the demand for educational rights advocates is high).

The Court relied on statements by declarants regarding their own hourly rates and their experience that it is difficult to find

lawyers who will take education civil rights cases. These statements were all based on personal experience, were relevant, and had foundation. The District's objections are thus either without merit or irrelevant.

III. CONCLUSION

The Court ORDERS that Plaintiffs be declared the prevailing party on both claims. The Court STAYS the motion with respect to expert fee recovery. The attorneys' fee recovery will be on the basis of the agreed upon rate at the time the fees were incurred, plus interest calculated at the prime rate.

The Court ORDERS that the District submit a detailed accounting of any hours it believes (1) were spent delaying the initial IEP meeting; and (2) were not spent on this matter and thus should be excluded from the fee recovery. The District must submit its accounting no later than two (2) weeks from the date of this Order; Plaintiffs' opposition is due two (2) weeks later; and the District's reply is due one (1) week after Plaintiffs' opposition is filed. A hearing will be scheduled as necessary.

IT SO ORDERED.

DATED: 1/12/06

STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE